STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2008
v	No. 275930 Branch Circuit Court
WALTER LEE MCELVAIN, Defendant-Appellant.	LC No. 05-088336-FC

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals by leave granted from his plea-based conviction and sentence for second-degree criminal sexual conduct, MCL 750.520c(1)(a) (CSC II). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case involves defendant's sexual abuse of his own son over a period of four years, when the boy was between three and seven years old. Defendant would enter the child's room, shake him awake, pull down the child's pants, and "lick [the child's] private parts with his mouth." According to the victim, "sometimes dad's mouth closes around it, but he doesn't bite it." Afterward, defendant would go outside and smoke a cigarette. The victim originally told his maternal grandmother about the abuse, stating that "dad tickled [the child's] back, stomach and sometimes on his private parts and he doesn't like it." When the grandmother asked what the child was talking about, "he told her his dad tickles his private parts and he doesn't like it, but dad says, 'I own you and I can do what I want.'" The investigating officer questioned defendant, asking whether he had ever licked his son's private parts. Defendant responded, "yes, once or twice but I have been trying to stop for a couple of years now." Defendant stated that it usually went on for "a couple minutes" and that he had "also used [his] hand a couple of times, but [drew] the line there." Defendant explained to the officer that it had been going on for a couple of years and that it usually happened in the victim's bedroom, but only on nights when everyone was gone.

Defendant provided a written statement to the police, stating:

> I have touch [sic] my son twice w/tougn [sic] & my hand several times. . . . I have been trying to stop & would like to get help but do not know where to go. I know its wrong. Please help me with my problem.

Defendant was originally charged with one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (CSC I), in addition to the one count of CSC II. In exchange for pleading nolo contendere to the latter charge, the prosecutor agreed to dismiss the former. The trial court utilized the state police incident report in determining there was a sufficient factual basis for defendant's plea.

Defendant was originally sentenced to four to 15 years' imprisonment, which was a departure from the recommended minimum range of 19 to 38 months. The court subsequently granted defendant's motion for resentencing and rescored offense variables (OV) 11 and 13, although the recommended minimum range remained at 19 to 38 months. Again departing from the guidelines and reimposing a four- to fifteen-year term, the trial court stated:

> As the Court had determined previously and would reiterate at this point, I do not believe that the guidelines adequately address the impact upon the victim and the victim's family, particularly because of his young age and because of the prolonged history of abuse that was committed against him. As a consequence the Court feels that it really has no option but, in the same way that it did before, to exceed the guidelines.
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> There has been a lot said about truth in sentencing, and there always remains some confusion whether sentences of terms of years, such as this one, mean what the judge intends when imposing them. It was this Court's intention, Mr. McElvain, that you serve the minimum sentence when I first imposed it. It is my intention that you serve it again.

On appeal, defendant argues that OV-11 and OV-13 were improperly scored and that the trial judge improperly found facts in violation of defendant's Sixth Amendment right to trial by jury. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Defendant also claims the trial court should have imposed an intermediate sanction rather than a term of imprisonment. We review constitutional claims de novo. *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007). Decisions by the trial judge concerning a sentence are reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 267-268; 666 NW2d 231 (2003).

OV-11, MCL 777.41, involves scoring for sexual penetration. The statute requires scoring for "all sexual penetrations of the victim by the offender arising out of the sentencing offense." In *People v Johnson*, 474 Mich 96, 102; 712 NW2d 703 (2006), our Supreme Court held that the straightforward language of the statute permitted scoring of points only for sexual penetrations "arising out of" the sentencing offense. Here, the sentencing offense was CSC-II and there were no penetrations arising from that offense. Thus, the trial court erred in scoring 25 points for OV-11.

OV-13, MCL 777.43, involves scoring for a continuing pattern of criminal behavior. Here, defendant admitted to police investigators that he committed two acts of fellatio and "several" acts of unlawful touching of the victim between 2001 and 2005. The victim told investigators that defendant had molested him 26 times. We conclude that OV-13 was properly

scored at 25 points because the evidence showed there were three or more crimes against the victim between 2001 and 2005.

The rescoring of OV-11 results in a reduced guidelines recommended range of 12 to 24 months. Generally, when a defendant's sentence is predicated upon an inaccurate calculation of the guidelines range, the defendant is entitled to resentencing. *Johnson*, *supra* at 103; *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006). But resentencing is not required if the trial court made clear that it "would have departed upward to the same extent if the guidelines had been properly scored." *People v Lathrop*, 480 Mich 1036, 1036; 743 NW2d 565 (2008). See also *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003). In this case, the trial court clearly indicated its intention to depart from the guidelines and impose a four-year minimum sentence regardless of the actual minimum range recommended by the guidelines. Accordingly, resentencing is not required simply on the basis that the guidelines were misscored.

We reject defendant's claim that the trial court engaged in improper fact finding in violation of his Sixth Amendment rights. Under Michigan's indeterminate sentencing scheme, the Sixth Amendment is not implicated when the trial court finds facts in support of the defendant's minimum sentence. *People v Drohan*, 475 Mich 140, 161-162; 715 NW2d 778 (2006). Moreover, in *Harper*, *supra* at 621, our Supreme Court rejected the defendant's argument regarding the proper application of MCL 769.34(4), the intermediate sanction statute. See also *People v Uphaus*, 480 Mich 939; 741 NW2d 21, reversing 275 Mich App 158, 162; 737 NW2d 519 (2007).

Finally, defendant claims the trial court abused its discretion in departing from the sentence guidelines without giving a "substantial and compelling" reason for doing so. We disagree.

We recognize that courts "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). We also recognize that the fact that defendant committed multiple offenses against a young victim that resulted in psychological harm was taken into consideration under various offense variables. However, it is clear from the trial court's statements that there were certain facts that were given inadequate weight in those variables. Specifically, the age of the victim, that the perpetrator was the victim's father, and that the victim reported over 26 separate incidents of criminal sexual conduct. Although OV-13 gave points for "three or more crimes," MCL 777.43(1)(b), 26 is considerably more than three, making the 25 points scored under OV-13 wholly inadequate to address the egregiousness of the behavior. See *Babcock*, *supra* at 258 n 12. Additionally, although OV-10 addresses the victim's youth, it simply provides for 10 points when "the offender exploited a victim's . . . youth." MCL 777.40(1)(b). This is no way accounts for the fact that defendant sexually molested his own three-year-old child. Finally, in light of the fact that OV-11 must be scored at 0 based on our analysis above, none of the factors took into account the fact that penetration was involved. It was clear from the trial court's statements that it was appalled by the number of crimes defendant committed, the relationship of the defendant to the victim, and the victim's age, and determined that the sentencing guidelines did not give sufficient weight to the exploitation defendant perpetrated.

Indeed, these facts "keenly" and "irresistibly" grab the attention and are "of considerable worth" in determining defendant's sentence. *Babcock*, *supra* at 257.

Moreover, these reasons are objective and verifiable as the defendant's relationship with the child is uncontested and the victim's age and number of offenses defendant committed is a fact outside of the judge's mind and can be independently confirmed. See *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Additionally, we note that defendant pled no contest to CSC II as part of a plea deal that resulted in the dismissal of a CSC I count. CSC I carries a term of life, or any term of years not less than 25 years. MCL 750.520b(2)(b). Defendant is serving less than a quarter of the minimum time he could have. Indeed, he is only serving a sentence of the same duration as the abuse he inflicted. To suggest that four years is somehow excessive in light of the fact that, absent the plea, defendant was looking at a sentence somewhere between 25 years to life, is to turn a blind eye to the egregiousness of the evidence before the trial judge.

"Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case." *Babcock*, *supra* at 268. At the prior sentencing, the prosecutor told the trial court "it's clear that [defendant] also wreaked havoc on his family and that the son he molested is taking medication right now, has had mood swings, has had quite an effect on him, so I certainly would not want to minimize the nature of this offense." The trial court then heard the testimony of the victim's grandfather, who stated:

> [Defendant] confessed to the state police about molesting [the victim], but, yet, in the community, he tells people that he has not done this, that [the victim] has made up this story. That bothers me that he hasn't showed signs of remorse. [The victim] has been robbed of his innocence, . . . his self-respect by these acts performed on him at such a young age. . . . [Defendant] was telling his son that he owned his body and that, if [the victim] told, he would have to go to prison. That's a guilt trip laid on a six and seven, eight-year-old child that is unbelievable. . . . Please put [defendant] in prison for as long as you can and make his time match his crime.

Given the evidence before the trial court, its statement that the guidelines did not adequately address "the impact upon the victim and the victim's family, particularly because of his young age and because of the prolonged history of the abuse that was committed against him," was sufficiently "substantial" and "compelling" to justify the departure under *Babcock*. We cannot say that this sentencing departure fell outside the range of principled results.[1] *Id.* at 269.

[1] Our position is supported by the recent holding in *People v Smith*, ___ Mich ___; ___ NW2d ___ (Docket No. 134682, decided July 31, 2008), slip op at 8, wherein our Supreme Court confirmed that sexual abuse occurring over a long period is an objective reason for departure. Although the dissent appears to agree that the repeated acts of molestation by this defendant on this victim are objective and verifiable and constitute a valid reason for a departure sentence, it (continued…)

Affirmed.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello

(…continued)

concludes that the sentence was not proportionate to the crime or to the offender. We strongly disagree. In our opinion, a minimum sentence of four years is proportionate to both this crime and this defendant.